No. 415. Brief of Atty. for Appellee.

Filed Oct. 20, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE NEW YORK INDIANS, APPELLANTS, v. THE UNITED STATES. } No. 415.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF THE CASE.

This suit was brought under a special act of Congress to enforce an alleged liability of the United States under the treaty of Buffalo Creek, made January 15, 1838, amended by the Senate June 11, 1838, assented to in its amended form by certain tribes, and finally proclaimed April 4, 1840. This alleged liability is, first, for the value of certain lands in the present State of Kansas, set apart for the New York Indians by that treaty, but

not granted to them by patent as contemplated by the treaty, which lands were never occupied by the said Indians (except temporarily as to a very small portion), but were ultimately sold by the United States for its own benefit; secondly, for the unexpended balance of a fund of $400,000 agreed to be appropriated for the benefit of the Indians in connection with their proposed emigration to these lands, which emigration never took place, except to a very slight extent; and thirdly, for certain annuities and other moneys agreed to be paid to certain of the tribes upon their emigration.

Any intelligible statement of the provisions of the treaty of Buffalo Creek, and of the manner in which and the extent to which it was acted upon by the parties thereto, necessarily involves a brief review of the events which occurred before it was made. It must therefore be first observed that in 1821 the Menomonee and Winnebago nations, with the President's approval, granted their Indian title, or right of occupancy, in certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations of Indians of New York, and the St. Regis, Stockbridge, and Munsee tribes, reserving to the grantors, however, hunting and fishing rights. The Six Nations were an Indian confederation, composed at one time of the Seneca, Cayuga, Onondaga, Oneida, Tuscarora, and Mohawk tribes, but since about 1789 the Mohawk tribe had resided in Canada, and the phrase "Six Nations of New York Indians" referred merely to the five other tribes just mentioned. The St. Regis, Stockbridge, Munsee, and Brothertown

tribes were, in 1821, Indian tribes residing in New York, but *not* belonging to the "Six Nations."* The consideration for the above-mentioned grant was only $2,000, of which sum the Stockbridges paid at least $900, and the Oneidas and Tuscaroras at least $600, but by what tribes the balance was paid does not appear. (Rec., pp. 7–8.)

In 1822 the Menomonees, with the President's approval, granted an Indian title, or right of occupancy, in an undefined tract of about 5,000,000 acres adjoining the above, to the Oneida, Tuscarora, St. Regis, Stockbridge, and Munsee tribes, reserving, however, to the grantors the right of occupancy in common with the grantees. The consideration, $3,000, was paid by the St. Regis, Stockbridges, Munsees, and Brothertowns, which latter tribe was, in 1825, admitted to share in the benefits of this grant. (Rec., pp. 8–9.)

The validity and effect of these grants being in dispute between the parties thereto, the United States made treaties with the Menomonees in 1831 and 1832, which

*On page 2 of the appellants' brief a list is given of all the tribes who claimed to have been parties to the treaty of Buffalo Creek, and to whom the jurisdictional act applied, several of the tribes being named more than once, but with slightly different appellations. The list closes with the statement, "These Indians are, in legal effect, the well known Six Nations." Nothing in the findings of the court below, nor in any treaty, warrants this statement. The court has found that the Seneca, Cayuga, Onondaga, Oneida, Tuscarora, and Mohawk tribes composed the Six Nations in 1780, and that the Mohawks afterwards withdrew. It has *not* found, and there is nothing in the record to warrant the assertion, that the St. Regis, Stockbridge, Munsee, and Brothertown tribes, or any of them, belonged to the Six Nations, and the language of the various treaties shows that they did not.

treaties were assented to by the New York Indians, and provided as follows:

(1) In consideration of $20,000, paid by the United States to the Menomonees, a certain tract of 500,000 acres at Green Bay, Wisconsin (on a part of which some of the New York Indians, chiefly, if not exclusively, Oneidas, had already settled), was ceded to the United States for the benefit of the New York Indians of the Six Nations and the St. Regis tribe, to be held by the latter by the same tenure as the Menomonees had held it, provided the New York Indians actually occupied the lands within such time as the President should appoint. All portions of the tract not so occupied within that time were to become the absolute property of the United States.

(2) For another consideration the United States bought of the Menomonees a tract of about 2,500,000 acres, including a portion of the 5,000,000-acre tract covered by the Menomonee grant of 1822, above mentioned, and out of these 2,500,000 acres the United States granted three townships on the east side of Winnebago Lake to the Stockbridge, Munsee, and Brothertown tribes. As these tribes had already settled under the Menomonee grant of 1822 on another part of the tract purchased by the United States, they were, in addition, compensated for their improvements. (7 Stats., 342, 405.)

No considerable emigration of the New York Indians to Wisconsin seems to have taken place after 1832, so that in 1838 the location of the various tribes was substantially as follows: The Senecas, Cayugas, and two-

fifths of the Onondagas lived on the four Seneca reservations in New York; the Tuscaroras, three-fifths of the Onondagas, about half the Oneidas,* and the St. Regis on the respective reservations of these tribes in New York; the other half of the Oneidas on a portion of the 500,000-acre tract at Green Bay, Wisconsin; and the Stockbridges, Munsees, and Brothertowns in the three townships east of Winnebago Lake in Wisconsin. The right of preemption of the land contained in the four Seneca reservations, and in nearly a third of the Tuscarora Reservation, was in the Ogden Land Company, of which Thomas Ludlow Ogden and Joseph Fellows were trustees, the State of New York having the right of preemption as to the Oneida, Onondaga, and St. Regis reservations, and about two-thirds of the Tuscarora Reservation being owned by that tribe in fee simple. (Rec., pp. 10, 22–24.)

The President never set any limit to the time within which the Indians might remove to the Green Bay lands (as he was required to do under the treaty of 1831), nor did the United States take possession, under that treaty, of the unoccupied portions of those lands; but in 1838 a new treaty was made (called the treaty of Buffalo Creek), which was amended and conditionally ratified by the Senate on June 11, 1838, and assented to, as amended,

* In "Schedule A," annexed to the treaty of Buffalo Creek (7 Stats., 556), the Oneidas at Green Bay are said to number 600, and the Oneidas in New York 620. In Schedule A as printed in the opinion of the court below (Rec., p. 30), the words "Oneidas in New York . . . . 620" have, by some clerical error, been omitted, and should be supplied.

by certain tribes, whose declarations of assent were declared satisfactory by the Senate on March 25, 1840, whereupon the treaty was proclaimed by the President on April 4, 1840. The preamble to this treaty declares that it is "entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men, and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing within such time as the President shall appoint." The tribes whose chiefs, head men, and warriors signed the original treaty were the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, Oneidas in New York, Oneidas at Green Bay, and St. Regis. The Senate resolution of June 11, 1838, declared that the treaty, as amended, should not be binding on any of the tribes or bands until it had been submitted to each tribe separately in council and fully explained by a commissioner, and freely assented to by the tribe, but that each assenting tribe or band should be bound by the treaty, although other tribes or bands might refuse their assent. The assents appended to the amended treaty are those of the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, Oneidas in New York, and St. Regis. (7 Stats., 550–564; Rec., p. 16.) Other arrangements, which will be referred to below, were made by treaty and statute with the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns. The provision in the preamble for the subsequent assent, in writing, by tribes

who did not originally execute the treaty appears never to have been made use of.

The treaty provided as follows:

The Indians who were parties to the treaty, "in consideration of the premises above recited and the covenants hereinafter contained," ceded to the United States all their right, title, and interest in the 500,000-acre tract at Green Bay, except a certain reservation therein described, upon which a portion of the Indians resided.

The United States, "in consideration of the above cession, * * * and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," agreed to set apart a certain tract of 1,824,000 acres, described by certain bounds, in what was then the Indian Territory, but is now the State of Kansas, "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin or elsewhere in the United States who have no permanent homes. * * * To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with" the act of May 28, 1830, § 3, it being "understood and agreed that the above-described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, residing in the State of New York." (Art. 2.) The original treaty added, "and at Green Bay," but these words were struck out by the Senate. (Rec., p. 11.)

The lands secured to the Indians by patent* were never to be included in any State or Territory of the Union. (Arts. 2, 4.)

It was agreed that "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time appoint, shall forfeit all interest in the lands so set apart to the United States." (Art. 3, originally 7.) Such acceptance and agreement were made by the Senecas for themselves and the Cayugas and Onondagas residing with them (Art. 10), by the Oneidas in New York (Art. 13), and by the Tuscaroras (Art. 14). The Oneidas at Green Bay and the St. Regis did not accept the country nor agree to remove, but it was provided that any individuals of those tribes who so wished should "be at liberty to remove to the said country at any time hereafter within the time specified in this treaty." (Original Art. 19, Rec., p. 14; Supplemental Art., 7 Stats., 561.) All special provisions for the Oneidas at Green Bay were, however, struck out by the Senate. (Rec., 14.)

By the original treaty the United States stipulated and agreed to remove all the Indians to their new homes,

* In the appellants' brief, page 6, occurs this statement:

> Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

This is a misrecital of the treaty, which provided that "the lands secured to them *by patent* under this treaty" (language which has no reference to any lands other than those for which patents were issued) should not be so included. A similar misrecital occurs on page 17 of the same brief.

and to supply them with provisions for one year after their arrival there; but any chief who was judged competent to remove himself and his family might do so independently and receive a commutation. The United States also agreed to erect council houses, churches, schoolhouses, etc., and to provide farming utensils, looms, etc. The Senate struck out all these provisions (Rec., pp. 12–14) and substituted a new article, agreeing to appropriate $400,000, "to be applied from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes and supporting themselves the first year after their arrival; to encourage and assist them in education," etc. (Art. 15.)

Special provisions were made for each of the tribes and bands that signed the original treaty, these provisions including in each case a promise to pay money (expressly stated in the case of the Oneidas and St. Regis to be for expenses incurred in connection with the Green Bay lands), certain of which payments were to be made after the Indians had emigrated. All payments not contingent on emigration were ultimately made, as also certain payments to individual Indians who emigrated. (Rec., 21.)

Simultaneously with the original execution of the treaty the Senecas, by a deed annexed to the treaty, sold to Ogden and Fellows all four of their reservations, the purchase money to be held by the United States and invested, and the income to be paid to the tribe. (Schedule

C; Art. 10.) The Tuscaroras also, by a deed annexed to the treaty, made a similar sale of that portion of their reservation to which the Ogden Land Company had the right of preemption, while that portion which the tribe held in fee was conveyed to the United States, in trust to sell and convey the same and invest the proceeds. (Schedule C; Art. 14.)

The Senate resolution of June 11, 1838, under which, as well as under that of March 25, 1840, the treaty was finally proclaimed, provided as follows:

> *Provided further*, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

Both before and after the treaty was finally proclaimed many of the Indians protested against its being carried out. These protests came especially from the Senecas, the Cayugas and Onondagas residing with the Senecas, and the Tuscaroras, all of which tribes lived on reservations which were sold to Ogden and Fellows (in the case of a part of the Tuscarora Reservation, to the United States) when the treaty was made. The Senecas and Onondagas requested that no appropriation be made to carry out the treaty, and asserted that they would never emigrate. The Tuscaroras declared that the tribe as a whole would not part with its reservation or remove from it, whatever a few individuals might do. These protests alleged that the chiefs who signed the treaty had been corruptly induced

to do so by an agent of the preemption owners, and that the great majority of the Indians wished to remain in New York. The Onondagas at Onondaga, a tribe which does not appear upon the face of the treaty as having either signed it originally or assented to it as amended, and in whose reservation the Ogden Land Company had no rights, declared officially that they would not remove. (Rec., 18, 19.)

In 1842 Ogden and Fellows made a new agreement with the Senecas, reciting the fact that the provisions in the former deed had never been carried out, and providing as a compromise that the Buffalo Creek and Tonawanda reservations only should be sold to Ogden and Fellows, while the tribe should "continue in the occupation and enjoyment" of the Cattaraugus and Allegany reservations, with the same right and title that they had had before the deed of 1838. The purchase money was proportionately reduced, but the disposition of it remained the same. By treaty of even date therewith, proclaimed August 28, 1842, the United States consented to the provisions of the new deed, and agreed that "any number of the [Senecas] who shall remove from the State of New York under the provisions of the [treaty of 1838] shall be entitled in proportion to their relative numbers to all the benefits of the said treaty." (7 Stats., 586–591.) Thereupon the Indians on the Buffalo Creek Reservation withdrew to the Cattaraugus and Allegany reservations. The arrangements as to the purchase money were carried out, and the resulting income has been regularly paid to the Indians. (Rec., pp. 19, 21–22.)

The act of March 3, 1843 (5 Stats., 612), appropriated $20,477.50 "for the removal to the west of the Mississippi of 250 of the New York Indians of the Seneca, Cayuga, and Onondaga tribes, and for fulfilling other treaty stipulations with them: *Provided*, That so many are willing to emigrate."

In 1845 Abram Hogeboom was appointed an agent to remove to the lands set apart under the treaty of 1838 such of the New York Indians as wished to go, some of the Indians having previously applied to the Government to have the proper steps taken for their removal to those lands. He mustered 271 for emigration, but when the party started in 1846 only 198 left New York, and only 191 arrived on the land, 17 others arriving subsequently. Out of the appropriation of 1843 $9,797.11 were expended upon these Indians before, during, and after their journey. Eighty-two of these Indians died and 94 returned to New York. (Rec., pp. 19, 21.)

On June 2, 1846, while the emigration party was on its way, a council of the Senecas and the Cayugas and Onondagas residing with them (to which council the Tuscaroras were summoned, but they did not attend) was held at Cattaraugus. The commissioner representing the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. He also reported that he held an enrollment for two full days, but that only seven persons enrolled themselves for emigration, and these stated that five others wished to go. (Rec., pp. 19–20.) Since that

time all the New York tribes have remained on the reservations they then held, except that a part of the Oneida Reservation was sold to the State of New York, and a part of the tribe joined their brethren at Green Bay. (Rec., pp. 18, 22–23.)

The Tonawanda band of Senecas did not remove from their reservation after its sale to Ogden and Fellows by the indenture of 1842. That indenture had required an appraisal of the land and improvements, and in 1857 it was held in *Fellows* v. *Blacksmith* (19 How., 366, 372), that, under the treaty of 1842, it was the duty of the United States to have the appraisal made. As there could be no payment until the sum to be paid was determined by the appraisal, and as Ogden and Fellows were not entitled to require a surrender of the land until the money found due by the appraisers was paid or ready to be paid, this decision virtually declared the United States liable for the nonremoval of the Tonawanda band. It is a matter of history that by 1857 the land set apart by the treaty of 1838 had been largely occupied by white settlers, who would have had to be forcibly ejected before the Tonawandas could have been settled there. On November 5, 1857, the United States made a treaty with the Tonawanda band (proclaimed March 31, 1859) under which, in consideration of $250,000 (part of which was used to purchase for the band the fee simple title to a large part of the Tonawanda Reservation), the Tonawanda band, numbering 650 persons, relinquished all claim to the lands set apart by the treaty of 1838 and all right to be removed thither, and to support and assistance after such removal. (11 Stats., 735.)

After the proclamation of the treaty of 1838 the United States took possession of and subsequently disposed of the balance of the 500,000-acre tract at Green Bay over and above that portion which was occupied and retained by the Indians, as provided in the treaty. (Rec., p. 20.)

In 1859 the Secretary of the Interior had the lands set apart by the treaty of 1838 surveyed. Thirty-two of the New York Indians were then resident on these lands, and allotments of 320 acres each (the quantity fixed by the proviso to the Senate resolution of June 11, 1838, above quoted) were made to them. On December 3 and 17, 1860, the President proclaimed the balance of the land to be part of the public domain, and it was subsequently sold as such. (Rec., pp. 21, 20.) The act of February 19, 1873 (17 Stats., 466), provided that any of the allottees who still resided on their allotments should obtain patents for them, and that the balance of the allotted land should be sold to *bona fide* occupants thereof, the purchase money to go to the allottees, provided they claimed it within five years.

The arrangements with the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns (none of which tribes or bands appear on the face of the treaty of 1838 as having assented thereto after its amendment, as required by the Senate, while only the Oneidas appear on the face of the treaty as having originally executed it) were as follows:

The Oneidas at Green Bay ceded, by a separate treaty in 1838, all their title to the 500,000-acre tract at Green Bay, except a certain reservation, which was ultimately

set off, and was treated as if it were the reservation excepted from the cession in the Buffalo Creek treaty, being of substantially the same size, though not bounded by precisely the same lines. (Treaty of Feb. 3, 1838, 7 Stats., 566; Rec., p. 20.)

By the treaty of September 3, 1839 (7 Stats., 580), part of the Stockbridge and Munsee Reservation east of Winnebago Lake was sold, and the emigration of such as should wish to emigrate was provided for. The acts of March 3, 1843 (5 Stats., 645), and August 6, 1846 (9 Stats., 55), provided for the division of the rest of the reservation in severalty, but were not wholly, if at all, carried out. The treaty of November 24, 1848 (9 Stats., 955), also provided for disposing of their land and for the emigration of those Indians who did not become citizens. Under the treaty of February 5, 1856 (11 Stats., 663), the unsettled portion of the Stockbridge and Munsee tribes removed to other lands in Wisconsin, which the United States obtained from the Menomonees by the treaty of February 11, 1856 (11 Stats., 679).

By the act of March 3, 1839 (5 Stats., 349), the Brothertown Reservation east of Winnebago Lake was divided among the Indians in severalty, and they were admitted to citizenship.

Upon the action of the Secretary of the Interior in 1859 in having the lands set apart by the treaty of 1838 surveyed, all the tribes who appear on the face of that treaty as parties thereto, as well as the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns, who do not so appear, employed counsel to prosecute their alleged claims for the value of

these lands and for their alleged share in the fund of $400,000 mentioned in the treaty, and they have since asserted their claims. All of these tribes and bands are parties to the present suit.

On January 6, 1896, the Court of Claims entered judgment dismissing the petition in this case, whereupon this appeal was taken.

II.

BRIEF OF ARGUMENT.

The question raised by this appeal is whether the failure of the tribes who were parties to the treaty of Buffalo Creek of 1838 to emigrate to the land set apart for them by that treaty entitled the United States to dispose of the land not allotted to the 32 Indians remaining thereon in 1859, and to retain the unexpended balance of the money appropriated for the removal of the Indians and the fulfillment of treaty obligations with them, and also released it from the obligation to appropriate for the same purpose any further portion of the promised $400,000, and to pay to the Cayugas and Onondagas residing with the Senecas, and the Tuscaroras, the unpaid balances of certain sums and the annual income of other sums, stipulated in each case to be paid to them on their removal to the West. The court below has decided that the substantially complete failure of emigration did relieve the United States from all obligation to give either land or money to any Indians but those who actually emigrated and remained on the land, and as the petition did not concern itself with the rights of these latter, which, as

regards land, were sufficiently protected by the *Act of February 19, 1873* (17 Stats., 466), it has been dismissed.

That the party who emigrated under Hogeboom, together with a few individuals who went subsequently, comprised all those Indians who desired to emigrate, and that very few even of this party remained on the land, is sufficiently established by the findings, so that the judgment of the court below would seem to be amply warranted by the facts. The judgment having been appealed from, however, it is necessary to study the case closely, which is best done with reference to four points, viz:

1. The consideration for the covenants of the United States in the treaty.
2. The character of those covenants.
3. The course pursued by both parties.
4. The rights of both parties in consequence of that course.

1. The consideration for the covenants of the United States.

As to this point it is submitted—

THE SUBSTANTIAL CONSIDERATION FOR THE COVENANTS OF THE UNITED STATES IN THE TREATY OF BUFFALO CREEK OF 1838, TO SET APART LAND IN THE WEST FOR THE INDIANS, AND TO APPROPRIATE MONEY IN AID OF THEIR REMOVAL THITHER AND PERMANENT SETTLEMENT THERE, WAS THE PROMISE OF SUCH REMOVAL AND SETTLEMENT WITHIN FIVE YEARS (A PERIOD WHICH THE PRESIDENT COULD EXTEND IF HE SAW FIT), WHICH REMOVAL AND SETTLEMENT THE

UNITED STATES WAS NOT REQUIRED, NOR IN POINT OF FACT ENTITLED, TO COMPEL BY FORCE, EXCEPT ORIGINALLY IN THE CASE OF THE INDIANS ON THE SENECA RESERVATIONS, AND THIS EXCEPTION WAS REMOVED BY THE TREATY OF 1842.

The preamble of the treaty recites the desire of the Indians "to seek a new home among their red brethren in the West," their purchases from the Menomonees and Winnebagoes of lands at Green Bay, in Wisconsin, the difficulty and contention that resulted, the treaties between the United States and the Menomonees, whereby 500,000 acres were "secured to the New York Indians of the Six Nations and the St. Regis tribe as a future home, on condition that they all remove to the same within three years or such reasonable time as the President should prescribe," and their failure in great part to remove. It further states—

> And they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory. And whereas the President being anxious to promote the peace, prosperity, and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian Territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

The first article provides that the tribes who are parties to the treaty, "in consideration of the premises above recited, and the covenants hereinafter contained, to be

performed on the part of the United States, hereby cede and relinquish to the United States all their right, title, and interest to the lands secured to them at Green Bay," except a certain tract; while the second article provides that "in consideration of the above cession and relinquishment on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," the United States agree to set apart a certain tract of country; and subsequent articles contain further covenants based manifestly upon the same consideration.

Taking the whole treaty together, it is clear that the consideration for the covenants of the United States was twofold, viz., first, the removal of the Indians in accordance with the "policy of the Government," or, as it is expressed in the article containing the agreement to set apart this land, "in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," and, second, the cession of all the Indians' right, title, and interest in the unoccupied portion of the 500,000-acre tract at Green Bay. What the latter consideration amounted to will first be examined.

The value of the cession of the right, title, and interest of the Indians in the lands secured to them at Green Bay necessarily depends upon the character of such "right, title, and interest." This may be gathered from the terms of the Menomonee treaty of 1832, read in the light of the intertribal treaties which preceded it. By those intertribal treaties (Rec., 8–9) the Six Nations and

the St. Regis, Stockbridge, and Munsee tribes had acquired for $2,000 an Indian title to 500,000 acres near Green Bay, subject to the fishing and hunting rights of the Menomonees and Winnebagoes, while two of the Six Nations, viz. the Oneidas and Tuscaroras, together with the St. Regis, Stockbridge, Munsee, and Brothertown tribes, had acquired for $3,000 an Indian title, in common with the Menomonees, to 5,000,000 acres adjoining the former grant. These cessions were approved by the President, because otherwise they would have been futile.

The United States held the fee of the Menomonee and Winnebago lands, as of all Indian lands outside the boundaries of the thirteen original States, subject only to the Indians' right of occupancy (*Beecher* v. *Wetherby*, 95 U. S., 517, 525), so that without its permission the Menomonees and Winnebagoes could not have transferred the right of occupancy, for otherwise as soon as they withdrew from the actual possession, which alone constituted their title, the title of the United States to those lands would have become complete (*Oneida Nation* v. *Oneida*, 14 Wis., 1, 17). The legal power of the President alone, without authority of Congress, to waive the right of the United States to assert the absolute fee simple title to lands which the Indians cede undertakes to cede to another may be questioned, but it was probably taken for granted, the matter being thought to be of small importance, and the subsequent [illegible] of Congress may be regarded as a valid approval.

The intertribal treaties established the boundaries between the Wisconsin and the New York tribes, but created (the first treaty practically and the second by

express terms) a tenancy in common between the grantors and the grantees. It is therefore not surprising that "much difficulty arose from the negotiations," and that "the claims of the respective parties were much contested, as well with relation to the tenure and boundaries of the two tracts as to the authority of the persons who signed the agreement on the part of the Menomonees." By the treaty of August 11, 1827 (7 Stats., 303), however, from which the words of the preceding sentence have been taken, the Menomonees and Winnebagoes referred the whole matter to the President for final decision, authorizing him "to establish such boundaries between them and the New York Indians as he may consider equitable and just." Accordingly the rights of the New York Indians in the Wisconsin lands were settled by the Menomonee treaties of February 8, 1831, and October 27, 1832 (7 Stats., 342, 405), to which the New York Indians assented.

The Menomonees, "always protesting that they are under no obligation to recognize any claim of the New York Indians to any portion of their country, that they neither sold nor received any value for the land claimed by these tribes" (7 Stats., 343), would yield nothing without payment, and accordingly, on payment of $20,000 (four times as much as the New York Indians previously had paid) by the United States, the Menomonees ceded to the United States a certain tract of 500,000 acres at Green Bay for the benefit of the New York Indians. In the treaty of 1831 (7 Stats., 342–347), the beneficiaries of this grant were stated to be "the New York Indians," which designation includes the Stockbridges, Munsees,

and Brothertowns. The Senate, however, in ratifying this treaty, provided "that for the purpose of establishing the rights of the New York Indians on a permanent and just footing," certain other pieces of land should be set off for the Stockbridges, Munsees, and Brothertowns, and the 500,000 acres at Green Bay, the location of the tract being somewhat changed from that proposed in the treaty, should be set apart for "the Six Nations of the New York Indians and the St. Regis tribe," instead of for all the New York Indians, as originally proposed in the treaty. (7 Stats., 347–8.)

By the treaty of 1832 the Menomonees acceded to this plan, except as to the location of the 500,000-acre tract, as to which a further change was made, so that it seems clear that the final grant of that tract to the United States was made for the benefit of the Six Nations and the St. Regis tribe exclusively. Hence when the treaty of 1838 (7 Stats., 550) recites that "500,000 acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe," it means precisely what it says, and refers only to those particular New York Indians and not to any others.

The 500,000 acres were to be held by the Six Nations and the St. Regis "under such tenure as the Menomonee Indians now hold their lands" (7 Stats., 343), provided that if they should neglect or refuse to remove from New York and settle on the lands within such reasonable time as the President should prescribe, all the lands which they should not have actually settled upon should be and remain the property of the United States. (7 Stats., 347.)

By the treaty of 1831 the Menomonees also ceded to the United States about 2,500,000 acres east of Green Bay and Fox River "in consideration of the kindness and protection of the Government of the United States, and for the purpose of securing to themselves and posterity a comfortable home." (7 Stats., 343). The details of this consideration are set out in the fourth article (7 Stats., 344–5), and include the building of houses, mills, and a blacksmith's shop, education, clothing, provisions, etc. As the Stockbridges, Munsees, and Brothertowns had settled on a part of this land, the United States, in accordance with the Senate resolution above referred to, gave them three townships on the east side of Winnebago Lake, paying the Stockbridges and Munsees $25,000 for their improvements, and the Brothertowns $1,600. (7 Stats., 347–8, 405–6.)

The results of these two treaties may be summed up thus: The "Six Nations" (i. e., the Senecas, Cayugas, Onondagas, Oneidas, and Tuscaroras—the Mohawks having withdrawn to Canada after the Revolution) and the St. Regis acquired, at the cost of the United States, an undisputed Indian title to the 500,000-acre tract at Green Bay, conditioned on their actual settlement thereon within such reasonable time as the President should prescribe, the United States, in case the Indians did not all remove within such reasonable time, to come into possession of all the unoccupied portion of the tract. The Stockbridges, Munsees, and Brothertowns acquired an undisputed Indian title to three townships east of Lake Winnebago, but no interest in the 500,000-acre tract, which,

as the treaty of Buffalo Creek itself expressly states, was secured to "the New York Indians of the Six Nations and the St. Regis tribe," a description which excludes the Stockbridges, Munsees, and Brothertowns.

Between the respective dates when the treaty of 1832 and the treaty of 1838 were made, a "reasonable time" for the complete emigration of the New York Indians had elapsed, but there had been no substantial emigration to the 500,000-acre tract, except by the Oneidas, nearly half of whom had gone, and they occupied that portion of the tract which was afterwards excepted from the cession in article 1 of the treaty of 1838. As to the balance of the tract, the President could at any time (under the treaties of 1831 and 1832, to which the New York Indians had assented) have set a very short limit to the period allowed for emigration, and on its expiration the United States would have had a complete title to all unoccupied portions of the tract. When, therefore, the New York tribes in 1838 ceded all their right, title, and interest in the greater part of the 100,000-acre tract, they merely surrendered an Indian title of which they could at any time have been deprived on very short notice. Their cession amounted to little, if anything, more than saving the President the trouble of fixing a date after which the land would have become the property of the United States in any event.

As each tribe of "the Six Nations and the St. Regis tribes" had an equal interest, under the treaty of 1832, in the 500,000-acre tract, the question of which tribes had paid, and in what proportions, for the attempted ac-

quisitions of 1821 and 1822 is only important as showing that the various tribes were not at all equally concerned in the project of emigration to Wisconsin. The total amount paid for these attempted acquisitions was only $4,950 ($2,000 under the intertribal treaty of 1821 and $2,950 under that of 1822), of which the Stockbridges, Munsees, and Brothertowns (who did not belong to the Six Nations) paid $2,850, the St. Regis $1,000, the Oneidas $400, and the Tuscaroras $200, leaving unidentified $500 in cash. (Rec., 8, 9.)

The fact that nearly half the Oneidas emigrated to Green Bay indicates that this last sum was probably paid by them. The findings do not show that the Senecas, Cayugas, and Onondagas ever paid a dollar to secure any rights in lands in Wisconsin, while Finding II states expressly that "the Senecas subsequently denied that they had any title to any lands in Wisconsin," and that "it does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860," the date when the tribes first began to allege that the cession of their defeasible rights in the Wisconsin land was the substantial consideration for the grant of the Kansas lands. When, therefore, the Senecas, and the Cayugas and Onondagas residing with them, joined in the cession of all right, title, and interest in the unoccupied portion of the 500,000-acre tract, they ceded what cost them nothing and what they seem never to have intended making any use of. The same is substantially true of the St. Regis and New York Oneidas, for the former received $5,000 and the latter $6,000 under the Buffalo Creek treaty (articles 9 and 13)

in reimbursement of all their expenses in connection with the Wisconsin lands. (Rec., 21.)*

These facts emphasize the totally nominal interest which the Indians in New York had in the Green Bay lands in 1838, and hence the totally nominal and unsubstantial character of their cession of rights in those lands, when viewed as a consideration for the Government's promise to set apart the Kansas lands. The rights which the tribes ceded were rights for which some of them had paid nothing, even in the first ineffectual attempts to

* In this connection it may be well to call attention to a patent error of statement in the opinion of the court below. (Rec., 26.) The opinion reads:

> The defendants have complied with the specific obligations assumed by them under this treaty to this extent alone. In 1846 they removed some 200 or more Indians to the new reservation (all, apparently, who wished to remove), and paid therefor the sum of $9,461.08; they allotted to 32 of these Indians 10,240 acres of land; in 1857 they secured from the Tonawanda band of the Senecas a release of all their rights under the treaty and in the lands, and paid them for this the sum of $256,000. In no other way, so far as appears, have the United States attempted to carry out their obligations under the treaty of Buffalo Creek.

The last part of this statement overlooks certain facts established by Finding XVIII (Rec., 21), viz:

> The following payments were *also* made under the treaty:
>
> Under article 9, $5,000 to the St. Regis tribe.
>
> Under article 11 and Schedule C, $1,500 to William King, he having emigrated in 1846.
>
> Under article 13, $6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.
>
> Under article 14 and Schedule B, $125 to James Cusick, he having emigrated in 1846.
>
> The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows, contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to nonemigration the Indians have received the money in New York.

obtain some title to the land, while others of them were repaid all that they had spent in such attempts. They were rights which, whatever had been paid in 1821 and 1822, were a free gift from the Government in 1832. They were rights which, as the Indians had fully demonstrated, they had no desire to make use of. They were rights which the President could at any time have extinguished by simply notifying the tribes that they must at once make use of them or lose them. Such a cession (where nothing passed that the grantors valued or that the grantee might not have obtained without any further consideration at all) could not have been the real, substantial consideration for the reservation of lands in the Indian Territory and the other covenants of the United States; and this consideration must therefore have been the other consideration expressed in the treaty, viz, the removal of the Indians to the west of the Mississippi, in accordance with the then "policy of the Government" referred to in the preamble to the treaty. By articles 10, 13, and 14 all the assenting tribes except the St. Regis had specifically agreed to remove, as follows:

> ARTICLE 10. It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract * * * and they [i. e., the Senecas, and the Cayugas and Onondagas residing with them] *agree to remove*—to remove from the State of New York to their new homes within five years and to continue to reside there.
>
> ARTICLE 13. * * * and they [the Oneidas residing in the State of New York] *agree to remove* to their new homes in the Indian Territory as soon

as they can make satisfactory arrangements with the governor of the State of New York for the purchase of their lands at Oneida.

ARTICLE 14. The Tuscarora nation *agree* to accept the country set apart for them in the Indian Territory, and *to remove* there within five years and continue to reside there.

The treaty as originally executed entitled the United States to compel the performance of these agreements to remove the original third article, reading:

> The United States stipulate and agree to remove all the New York Indians of the several tribes described in the foregoing article to their new homes. (Rec., p. 12.)

That this authorized a compulsory removal is clear from the fact that the only tribes who executed the original treaty without agreeing to remove, stipulated against a compulsory removal, as follows:

> ARTICLE 19. * * * It is expressly agreed that if any of the [Oneida] Indians now at Green Bay wish to remove to the country set apart as their future homes, they shall be at liberty to do so. * * * This article shall not be construed to authorize the Government to compel them to remove. (Rec., pp. 14, 15.)
>
> SUPPLEMENTAL ARTICLE. * * * And it is further agreed that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. (7 Stats., 561.)

Had the Government not possessed, under the original third article, the power to compel the Indians to remove,

these special restrictions upon the exercise of that power would not have been required. The Senate, however, doubtless in deference to the numerous protests against removal mentioned in Finding XI (Rec., p. 18), struck out that article, so that, as finally ratified and proclaimed, the treaty provided for a voluntary removal only.

The court below, it is to be observed, has not found it necessary to decide whether the treaty authorized a forcible removal or not,* the opinion reading as follows:

> It [the treaty] said in substance to the Indians: If you wish to go West notify us and we will take you and provide for you; or, take the other argument, it empowered the President to order the Indians west if he deemed it wise to do so. * * * Perhaps the President had the power and technical right under the treaty of Buffalo Creek to surround the Indians with troops and force them away from their homes against their will, but it was not a power he must use, and it was not a power which the Indians wished him to use. (Rec., 41.)

That the Indians did not wish the President to use any such power is most certainly true. Their protests and

* In an earlier part of the opinion it would seem as if Davis, J., had at one time considered that the right of forcible removal existed, for he states: "It was the right of the Government, given it expressly by treaty, to cause the Indians' removal, but it never attempted to enforce that right." (Rec., p. 34.) As the question was manifestly left open, further along in the opinion, in the passages cited in the text from page 41 of the record, the retention in the opinion of the passage here cited from page 34 was obviously inadvertent, especially as the right of forcible removal, "expressly" given by the original treaty, had been stricken out on its amendment.

declarations and the action of the council in 1846 (Findings XI and XIII; Rec., 18, 19) amply warrant the conclusion reached by the court below on that point, and certainly, if there be any force in the maxim *volenti non fit injuria*, no court could uphold a suit brought by the Indians against the United States for following the precise course which the Indians desired should be followed. The court below would therefore have been fully justified in its ultimate conclusion that the United States could not be held liable for the failure of the Indians to emigrate, even if it were a fact that the treaty authorized a compulsory removal; but a study of the changes in the treaty makes it clear that no such authority existed, and the language of the court below, quoted above, shows an evident leaning to this view, although the decision of the point was not thought essential.

It has been stated above that the amended treaty of 1838 did not authorize a forcible removal of the Indians to the West, *except* in the case of those living on the Seneca reservations, which exception was done away with by the treaty of 1842. This exception necessarily resulted from the sale of all four of the Seneca reservations to Ogden and Fellows, with the approval of the United States, by the indenture of January 15, 1838, which was incorporated into the treaty. (7 Stats., 559.) The United States having approved this sale, it was incumbent upon it to see that it was carried out in good faith by both parties, and as such carrying out necessitated the removal of the Indians, the Government was required to remove them against their will, should they

persist in refusing to go, and should the purchasers insist on obtaining possession of the property. Hence, as the United States had a right to take the Indians forcibly from these four reservations, and as there was no other place for them to go to except the land which had been set apart for them in the West, it must be admitted that *these particular Indians* could, under the treaty of 1838, have been forcibly removed to the West.

With the execution of the indenture and treaty of 1842 (7 Stats., 586), however, the case was altered. The Cattaraugus and Allegany reservations being released from the sale, the Indians living on them were freed from all obligation to go elsewhere, and the United States was freed from all obligation to take them against their will. Moreover, while there was still a duty to effect a removal of the Indians from the Buffalo Creek and Tonawanda reservations, even against their will, this did not involve a right to remove them forcibly *to the West*, since these Indians, being Senecas, had as good a right to live on the Cattaraugus and Allegany reservations as had their brothers who were there already. The voluntary and peaceable withdrawal of the Buffalo Creek Senecas to the Cattaraugus and Allegany reservations (Rec., p. 19) released the United States from any further responsibility to Ogden and Fellows in regard to the Buffalo Creek Reservation, and if the Tonawanda Senecas had followed the same course, the result would have been similar.

In the case of the Tuscaroras, the United States never had, under the treaty of 1838 as amended, any right to

remove them forcibly to the west. What they had sold to Ogden and Fellows was less than a third of their reservation, and those living thereon, even if forcibly expelled therefrom by the United States, could have been placed on the other part of the reservation if they preferred going there rather than to the West. This other portion of the reservation had been granted to the United States, but merely as a trustee or agent for the purpose of a sale for the benefit of the Indians, who were owners in fee simple. Such agency was clearly revocable at any time before actual sale (and no actual sale ever took place), and neither the United States nor third parties had any interests which were entitled to be enforced by a compulsory removal of the Indians.

It was contended in the court below that the cases of *Fellows* v. *Blacksmith* (19 How., 366) and *State of New York* v. *Dibble* (21 *id.*, 366) were authority for holding that the treaty of Buffalo Creek entitled the United States to remove the Indians to the West by force, but a careful examination of those cases makes it clear that they can not be regarded as furnishing any real authority for such a proposition. Both these cases concerned the rights of the purchasers of the Indian title to the Tonawanda Reservation, under the indenture of May 20, 1842 (7 Stats., 587), superseding that of January 15, 1838 (7 Stats., 557), as against the Indians, who had remained in possession of the entire reservation.

It was held, in the first case, that the purchasers could not expel the Indians by force, and, in the second, that they could not settle or reside upon the lands at all until

the Indians had removed, and, in fact, that their rights under the purchase and the treaty which approved it were to be decided, "not by the courts, but by the political power which acted for and with the Indians." That it was the duty of the United States to see that the contract between the Indians and Ogden and Fellows was carried out in good faith, and to that end to perform, for its part, whatever obligations the treaties of 1838 and 1842 cast upon it, will not be denied; but it is equally undeniable that if, as this court held in *State of New York* v. *Dibble*, the validity of those treaties, and of the indentures made in connection with them, to bind the Tonawanda band, was not a question to be decided by the courts as then constituted, but only by the United States, then the statements in the opinion in *Fellows* v. *Blacksmith* as to the duty of the United States in connection with the removal of the Indians in accordance with those treaties must be regarded as *obiter*, and not as authority on a point of law.

Moreover, the statements of Mr. Justice Nelson, in *Fellows* v. *Blacksmith*, as to the removal of the Indians, were not made with that accuracy which usually marks the opinions of this court. Nor, apparently, did the record in that case disclose all the facts bearing upon the question of removal. A striking instance of this is found in the words, "A large fund *was appropriated*, and *in the hands of the Government*, to be disbursed in aid of such removal, and of their support and encouragement after their arrival." (19 How., 371.) In point of fact, while

the treaty of 1838 had promised an appropriation of $400,000 for those objects, only $20,477.50 (*Act of March 3, 1843*, 5 Stats., 612) had ever been actually appropriated. While opinions have differed as to the constitutional power of Congress to refuse an appropriation called for by a treaty, it has never been suggested, and Nelson, J., can not be supposed to have meant, that a treaty could appropriate money without any Congressional action whatever. Hence this statement as to the appropriation is manifestly incorrect.

A more serious inaccuracy of Mr. Justice Nelson is the statement that the Senecas' "agreement [in the treaty of 1838] to remove to their new homes [in the West] * * * remained unaffected by the second treaty," that of 1842. As will be shown more fully below, the United States, in consenting that the Senecas should reacquire the title to two of their reservations and should remain in undisturbed possession thereof, necessarily released them from their agreement to remove to the West, and hence it was no breach of treaty for the Buffalo Creek Senecas to remove to the Cattaraugus and Allegany reservations (Rec., p. 19) instead of going West, nor would it have been any breach of treaty had the Tonawanda Senecas done the same, there being apparently land enough for them there to live as civilized human beings. This fact seems to have been wholly overlooked by Nelson, J., and hence his statements as to the duty of the United States to remove these Indians to the West, and what had usually been done in such cases, are peculiarly inappropriate, since the only Indians

then before the court were not bound to go to the West, but could have gone to Cattaraugus and Allegany just as well.

The reservation of the Tonawanda Senecas having been sold, with the Government's approval, it was, of course, the duty of the United States to see that the agreement was fulfilled, and therefore to remove the Tonawandas somewhere, either to the West or to the other Seneca reservations, even against their will; but the existence of this right of forcible removal, in the case of this particular band, does not imply any right to forcibly remove *to the West* the other tribes and bands in whose reservations third parties had no rights which required to be enforced.

The record in *Fellows* v. *Blacksmith* seems not to have disclosed the fact that the treaty of 1838 originally contained a provision for a forcible removal, which provision was struck out by the Senate, and that the stipulation of the St. Regis Indians against such a removal was made before the amendment of the treaty, and in view of that original provision. Had Nelson, J., been aware of these facts, he would not have referred (19 How., 372) to that stipulation as evidence of the existence of a right of forcible removal.

The Senate's abandonment of the power secured to the United States in the original draft of the treaty, to compel a removal of the Indians, necessitated two further changes in the treaty, one in the interest of the Indians and the other in that of the United States. The first was the provision in article 15 for an appropriation of

money, "to be applied under the direction of the President of the United States in such proportions as may be most for the interest of the said Indians, parties to this treaty," for certain purposes, one of which was "to aid them in removing to their homes." The other, which will be discussed more fully below, was a provision for the probable event of a merely partial emigration, and was made a part of the treaty in the form of a proviso to the first resolution of ratification, as follows:

> *Provided further*, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of $400,000, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant 320 acres only. (Rec., p. 17.)

The adoption of this controlling proviso, along with the excision of the original section as to removal by the United States, demonstrates most clearly that the Senate did not intend that any of the Indians should be forced to remove against their will.

The proviso reads, "if any portion or part of said Indians do not emigrate, the President shall retain," etc. These words do not of themselves set any time limit to the exercise of the right to emigrate, and it was unnecessary that they should, that being set by the treaty itself. As the only emigration contemplated by the proviso was an emigration under the treaty, the treaty itself must be looked to to ascertain the limit of the time within which such emigration might take place. Article 3 (originally 7) of the treaty required an agreement "to remove * * *

within five years, or such other time as the President may, from time to time, appoint," and hence the agreements of the Senecas and others, in articles 10 and 14, expressly named five years as the time within which the respective tribes agreed to emigrate, while that of the New York Oneidas, in article 13, which names no particular time, must obviously be understood as made in view of the limit set by article 3, no other limit being authorized by any portion of the treaty. The same limit was also set in the case of the St. Regis tribe, whose individual members had the right to emigrate "within the time *specified* in this treaty" (7 Stats., 561), although the tribe had not itself agreed to remove. Lastly, while, as will be seen below, the Senecas, together apparently with the Cayugas and Onondagas residing with them, were ultimately released from their tribal agreement to remove, the treaty of 1842 (7 Stats., 590) accorded their members the right to emigrate "under the provisions of" the treaty of 1838, i. e., of course, within the time limited by article 3 of that treaty.

The meaning and effect of article 3 (originally article 7) will be best understood when the changes which the other parts of the treaty underwent at the hands of the Senate are taken into consideration. This article declared that such of the tribes as did not "accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit," etc. A change in the order of the words would have improved the language, but the meaning is sufficiently clear, viz,

that such of the tribes as do not *accept the country set apart for their new homes, and agree to remove thereto* within five years, or, etc., shall forfeit, etc. Under the original treaty this section restricted all interest in the Western lands to the tribes which accepted them and agreed to emigrate, but it imposed no forfeiture upon those tribes, because when once a tribe had accepted and agreed the United States was charged, under the original third article (Rec., p. 12), with the duty of seeing that this agreement was performed, and hence no forfeiture by any such tribe was possible. Should any of them refuse to keep their agreement the consequence was not to be forfeiture, but merely that they would be compelled to keep it in spite of their refusal. Should, however, the President find that it would be an unnecessary hardship to any tribe to be made to remove within the five years, although it had agreed so to do, he could extend the time.

In the case of the St. Regis tribe and the Oneidas at Green Bay the original treaty made an exception. Though they did not accept and agree, any of their members were allowed all the rights of members of the accepting tribes, in spite of the forfeiture provided in case of nonacceptance. (Suppl. art., 7 Stats., 561; original art. 19, Rec., p. 14–15.) The only effect of the original seventh article (now third) upon these tribes was to specify five years as the time within which any of their members might emigrate. Should the latter fail to do so within that time, they would lose the right to do so, unless the President saw fit to extend the time for them.

The Senate not only struck out the article containing the exception in favor of the Green Bay Oneidas, but also altered in a measure the effect of the original seventh article (now third) by striking out the original third article, which had charged the United States with the removal of the Indians. This left it optional with the Indians of the accepting tribes to remove or not as they saw fit, and if any of them failed to do so within five years as they had promised the consequence would not be, as originally provided, that they could be compelled to go, unless the President extended the time for them, but merely that they would lose their right of emigration altogether, unless the time were extended.

The appellants contend that article 3 did not limit, even provisionally, the time allowed for emigration, but required the President to fix a time. This contention practically strikes the words "five years or such *other*" out of article 3 and construes it as requiring merely an agreement to remove within such time as the President may from time to time appoint. It is submitted that such a construction violates the plain intent of the language used, and is wholly unwarrantable.*

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* It may be as well to note in this connection an apparently inadvertent statement in the opinion of the court below as follows:

> We have already seen that the Supreme Court holds that no time was fixed for removal (*Fellows* v. *Blacksmith*, *supra*), where the court said: "We hold that the performance of the conditions of the treaty was not a duty that belonged to the grantees, but to the Government under the treaty." (Rec., p. 35.)

Where it is said that "no time was fixed for removal," this obviously means not that no time was fixed *in the treaty*, but that the President fixed none, as the court below had "already" stated was the case. (Rec., p. 33.) What makes it clear that the statement

That article 3 set a limit of five years to the exercise of the right to emigrate is recognized by the language used in other parts of the treaty. The Senecas (for the Cayugas and Onondagas residing with them as well as for themselves), in article 10, and the Tuscaroras, in article 12, distinctly agreed to remove within five years, which they would certainly never have done had they understood article 3 as meaning that the time for removal was unlimited until the President should see fit to limit it. The supplemental article, executed by the St. Regis, refers to "the time specified in this treaty," and as no time was specified for removal except by article 3, these words must refer to that article as having specified, i. e., fixed, a time.

The words of article 3 are, "such other time as the President *may*, from time to time, appoint." Where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power, "may" in a

is inadvertent, however, is the fact that the opinion contains no previous reference to the decision in *Fellows* v. *Blacksmith* in that connection, but only in regard to the validity of treaties (Rec., p. 32); and, further, that the opinion in *Fellows* v. *Blacksmith* does not consider the question of the *time* for removal at all, but only the duties of the United States in regard to removal. Moreover, the passage from that opinion, quoted in the opinion of the court below, does not refer to the duties of the United States to the Indians, but its duties to "the grantees," i. e., the parties to whom the Senecas had granted and sold their Indian title to the Tonawanda Reservation. What that passage means is that the approval of that sale by the United States had bound it to see that the grantees were fairly treated and to have the appraisal made, whether the Indians opposed this or not. Neither this passage nor any part of that opinion refers to the fixing of a time for removal to the West.

statute is equivalent to "shall" (*Minor* v. *Mechanics' Bank*, 1 Pet., 46, 64; *Mason* v. *Fearson*, 9 How., 248, 259), but it can not be so regarded unless the context clearly warrants that construction. Here there is not only nothing to warrant it, but the context excludes the possibility of such a construction. If this article required the President to appoint a time for removal at all, it required him to do so from time to time as long as any Indians who might have removed had not done so, or in other words it required the United States to await the pleasure of the Indians in the matter for an unlimited period of time, which would have been manifestly absurd.

In support of their contention that the President was *required* to extend the time for emigration beyond five years, in case the Indians did not emigrate within that time, the appellants point (Brief, p. 21) to the Menomonee treaty of February 8, 1831, as amended, which provided—

> That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them, and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers in such manner as he shall deem equitable and just. (7 Stats., 347.)

The appellants assert that the language in the Buffalo Creek treaty is *similar*, and must therefore be similarly construed. This assertion is startling, to say the least. While the provisions in the two treaties are similar up to a certain point, in this matter of the time for emigration they differ radically. The earlier treaty says "the President of the United States *shall* prescribe the time," while

the later treaty says "within five years or such other time as the President *may* from time to time appoint." The one required the President to fix the time; the other fixed it, permitting the President to extend it or not as he might deem best, and even to make several extensions, but not requiring any extension of the period whatever. This manifest difference between the Buffalo Creek treaty and that of 1831 was evidently due to the previous course of the New York Indians in the matter of emigration. Under the treaty of 1831, fixing no definite time for emigration, no substantial emigration took place, the removal to the Green Bay tract having mostly taken place before. In providing, by the treaty of Buffalo Creek, for a final settlement of the emigration question, it was obviously desirable to avoid all possible delay and uncertainty by fixing a definite period, and making the Indians understand that their *right* to emigrate would expire in five years, though authorizing the President as a matter of *grace*, or if he judged it necessary in order to carry out the Government's policy, to extend the time. The treaty of 1831 was made under the evident impression that the Indians wished to emigrate, and that of 1838 with full knowledge that many of them did not. In the one case it was thought unnecessary to fix a time; in the other it was thought necessary in order to bring matters to a conclusion; and the different circumstances under which the two treaties were made account for the different provisions.

The appellants assert (Brief, p. 22) that the Indians understood that their right to emigrate would continue

until the President fixed a time by affirmative action. The findings contain nothing to warrant this assertion. The language of the treaty is clear enough, and the declarations of assent to the amended treaty state that the whole treaty had been fully explained to each assenting tribe. Everything points to the conclusion that the Indians understood the treaty to mean just what it said, and that when they agreed to remove within five years they knew what the consequences of nonremoval would be.

2. The character of the covenants of the United States.

As to this point it is submitted—

BY THE AMENDED TREATY OF BUFFALO CREEK OF 1838, AS FURTHER MODIFIED BY THE TREATY OF 1842, THE UNITED STATES COVENANTED TO SET APART A CERTAIN TRACT OF COUNTRY FOR, AND TO APPROPRIATE MONEY TO AID IN THE REMOVAL AND SETTLEMENT OF, SUCH TRIBES AS ACCEPTED THE COUNTRY SET APART FOR THEM AND AGREED TO REMOVE THERETO WITHIN THE TIME SPECIFIED IN THE TREATY, AS WELL AS SUCH INDIVIDUALS OF THE SENECA TRIBE (INCLUDING APPARENTLY THE CAYUGAS AND ONONDAGAS RESIDING WITH THEM) AND THE ST. REGIS TRIBE AS SHOULD ACTUALLY REMOVE WITHIN THAT TIME, THE SAID LAND TO BE ULTIMATELY GRANTED TO THEM BY PATENT, PROVIDED THAT IF ANY PORTION OF THE INDIANS DID NOT EMIGRATE, THE PRESIDENT WAS TO RETAIN A PROPER PROPORTION OF THE MONEY TO BE APPROPRIATED, AND ALSO TO DEDUCT FROM THE QUANTITY OF LAND ALLOWED SUCH NUMBER OF ACRES AS WOULD LEAVE TO EACH EMIGRANT 320 ACRES ONLY.

THE ONEIDAS IN NEW YORK AND THE TUSCARORAS WERE THE ONLY TRIBES WHO ACCEPTED THE COUNTRY AND AGREED TO REMOVE THERETO, THE ACCEPTANCE AND AGREEMENT OF THE SENECAS, AND OF THE CAYUGAS AND ONONDAGAS RESIDING WITH THEM, HAVING BEEN REVOKED BY THE TREATY OF 1842.

The first thing to be noted in regard to the covenants of the United States is that the United States did not, either by the treaty of Buffalo Creek or subsequently, *grant* the land in question in the present suit to the New York Indians or any of them. The 10,240 acres allotted to the 32 Indians who remained on the land in the West may have been ultimately granted to *them*, but those 10,240 acres are not involved in the present suit, which concerns land that was set apart, reserved for a time, but never granted.

The language of the treaty itself is clear as to this. It reads:

> The United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians * * * who have no permanent home, * * * which said country is described as follows, to wit: Beginning [etc.] * * * To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved the 28th day of May, 1830, with full power and authority [etc.].

This is not the language of a grant, but of a promise to reserve lands out of which grants might subsequently be made. The grants were to be by patent from the President, and until such patents issued there could be no grant, though performance by any tribe or nation of the Indians of its promise to accept and remove—the promise which constituted the real consideration for the covenants of the United States—would of course give such tribe or nation a right to demand a formal grant, or practically an equitable title to its share of the land. The treaty itself contains no words of grant, and the provision that the various tribes were "to have and to hold" their land "by patent," not by the treaty, would never have been adopted had it been intended to grant the land by the treaty and not by the patents. The fact that a grant was promised, but not made, is recognized throughout the whole treaty. The land itself, whether the entire tract or such portions as were intended for particular tribes, is never referred to therein as the land "granted," but always as "the country set apart" or "the tract set apart." The one provision which was designed to enlarge the proposed grant beyond what was customary, and which therefore could not take effect until the grant was actually made, was the provision that the land should not be included in any State or Territory. (Art. 4.) Had the land been granted by the treaty this provision should have read "The lands *hereby granted* shall never be included in any State or Territory of the Union;" but instead of this it reads "The lands *secured to them by patent* under this treaty shall never be included," etc., because until the lands were secured by

patent they were not granted, and until they were granted the provision as to noninclusion would not attach.

The whole tract intended to be set apart, and even the portions intended for the leading tribes, were sufficiently described in the treaty, so that patents would have been superfluous evidences of title had the grant been made by treaty, by "the law of the land."

The reason for not making the grant in the treaty itself, but requiring it to be made by patent, is to be found in the experimental nature of the treaty. The previous attempts to secure an emigration to Wisconsin had been only partially successful, and the language of the preamble shows that the framers of the Buffalo Creek treaty had the possibility of another failure in mind. The President was stated to be "anxious to promote the peace, prosperity, and happiness of his red children," and "determined to carry out the humane policy" of removal, and to bring them to "see and feel, by his justice and liberality, that it is for their true policy and for their interest to [remove] without delay." It was a treaty to induce the Indians, or as many of them as possible, to emigrate, not a treaty which would inevitably bring about a complete emigration. This being so, a grant of land in advance of emigration payment in advance for the performance of promises made by Indians, a race fickle and unstable to the last degree, would have been most unwise. The prospect of receiving a grant was held up to each tribe as the inducement to emigrate, but no grant was to be made until the promise was performed, and then only to such tribes as had performed their promises.

The proposed grants were not to be in fee simple in the ordinary acceptation of the term, as the grantees, the tribes, were to possess no power of alienation to outside parties. The original treaty had provided otherwise ("To have and to hold the same in fee simple forever, by patent," etc., Rec., 11), but the Senate struck out the sentence containing those words, and provided instead that the land should be held under patents issued in conformity with the act of May 28, 1830, section 3, containing an express provision for a reversion to the United States "if the Indians become extinct or abandon the same." As between themselves the Indians were to be allowed to sell and convey, subject to their tribal laws, but neither tribes nor individuals had that unrestricted power of sale which marks an estate in fee simple.

The appellants' brief contains the extraordinary statement, on page 32, that "it is conceded that the treaty of Buffalo Creek operated as a grant *in presenti* to the New York Indians of the Kansas lands." Neither the appellee nor the court below concede anything of the sort. The treaty operated to set apart certain lands for a certain length of time within which such Indians as wished were to be aided in removing thereto; after which removal, and not before, the tribes were to receive grants of so much of the land as they were entitled to by patent. As no such patents were issued (except as to the 10,240 acres not in dispute) the question whether the United States could, without action by Congress, take advantage of any reversion of the land so patented can not arise, and certainly no question as to the need of

Congressional action to enable the United States to assert its ownership of the unoccupied portion of the tract set apart by the treaty can arise, because that tract was never granted away by the United States, but the title always remained vested in the United States, who could, therefore, properly appropriate the land to its own uses upon a failure of the Indians to avail themselves of the provisions of the treaty and to remove.

It being clear that the treaty of Buffalo Creek did not *grant* the land to the Indians, it remains to consider precisely what rights the treaty gave them in regard to the land. These rights—rights to settle upon the land, to receive patents therefor, to be aided in the settlement and development thereof, and to be protected in the possession thereof—were dependent upon two conditions, viz, first, the acceptance of the country set apart for them and the agreement to remove thereto within a certain time, without which these rights could not be acquired; and second, actual removal in accordance with the agreement, without which these rights would be lost.

The first condition was expressed in article 3, as follows:

> Such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States.

The character of the acceptance and agreement contemplated by this article is shown in articles 10, 13, and 14. It was an acceptance of the country set apart, and

an agreement to remove thereto within the time stated, expressed in the body of the treaty itself. This is certainly true as far as concerns the tribes whose chiefs, headmen, and warriors subscribed their names to the treaty. Had any other tribes afterwards given their assent to the treaty in writing, as provided in the last clause of the preamble, their acceptance and agreement could not have been expressed in the body of the treaty, but it would have had to be equally explicit and formal in its character, and could not have been inferred from a mere assent to the treaty itself. Assent to the treaty bound the assenting tribe or tribes to cede all right, title, and interest that they might have in the Green Bay tract, except the Oneida Reservation, and it entitled them to share in the benefits of the grant of the lands in the Indian Territory, but only *provided* they accepted those lands and agreed to remove thereto.

This fact renders it needless to discuss the propriety of the conclusion of law, announced in the opinion of the court below (Rec. 31–32), to the effect that *all* the tribes of New York Indians named in the treaty, whether residing in New York or not, and whether subscribing to the treaty or making any declaration of assent thereto or not, became parties thereto by declaring their assent to the treaty in its amended form, as required by the Senate resolution of June 11, 1838. The question is not what tribes were parties to the treaty; it is not what tribes assented to the amended treaty in the manner required by the Senate. It is what tribes *accepted the country* set apart for them and *agreed to remove* thereto. Whatever might be the

rights and obligations of the tribes who were parties to the treaty, only those who accepted the country and agreed to remove thereto had, as tribes, any part or lot in the promised reservation. Hence, for instance, it is immaterial whether the Onondagas at Onondaga or the Oneidas at Green Bay were parties to the treaty or not. The court below has decided, as a conclusion of law, that they were parties thereto, but it has not decided and it is not true that those separate and independent tribes of the original Onondaga and Oneida nations ever accepted any country set apart for them or ever agreed to remove thereto. Hence there can be no doubt that they come within the operation of article 3.

As has been already stated, the tribes which accepted the country and agreed to remove, as required by article 3, were the Senecas, the Cayugas, the Onondagas residing with the Senecas, the Oneidas in New York, and the Tuscaroras (articles 10, 13, 14), while, in the treaty as originally executed, the Oneidas at Green Bay and the St. Regis, though making no such acceptance or agreement, secured to such individual members of their tribes as should emigrate within the time allowed the rights of members of the accepting tribes. A separate treaty having been made with the Oneidas at Green Bay (7 Stats., 566) and proclaimed before the Senate passed on the Buffalo Creek treaty, this provision in favor of individuals of that tribe was struck out (Rec., 14–15), leaving the St. Regis the only tribe to whose individual members such rights were granted. The treaty of 1842, however, transferred the Senecas, and apparently also the Cayugas

and Onondagas residing with the Senecas, to the same category as the St. Regis.

The truth of the statement just made becomes manifest when the terms of the treaty of 1842 are studied in the light of the circumstances which then prevailed and are compared with those of the treaty of 1838. By the indenture annexed to the treaty of 1838 the Senecas had sold all their reservations to Ogden and Fellows (7 Stats., 557–559), thereby putting themselves in a position where they could ultimately be forced to emigrate if Ogden and Fellows took the proper legal steps to compel them to do so. It was the existence of this right of compulsion by Ogden and Fellows, and not any supposed right of compulsion on the part of the United States under the treaty itself, which induced the Senecas to protest against the ratification of the treaty, for, as has already been shown, the United States had no such right of compulsion, expect as regards fulfillment of the contract with Ogden and Fellows. The right of Ogden and Fellows to call for a fulfillment of the contract was, however, indisputable, and it was for this reason that, as the court below has found—

> After the amended treaty had been assented to the Senecas, the Cayugas and Onondagas residing with them, * * * continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. * * * The Indian protests against the treaty

were based upon the following allegations: (*a*) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the preemption owners; (*b*) that a considerable majority of the Indians wished to remain in New York. (Rec., 18, 19.)

The fruit of these protests was an important change in the contract, made by the treaty of May 20, 1842. (7 Stats., 586.) This treaty is far more than a mere approval by the United States of a private arrangement between the Senecas and the Ogden Land Company; it materially altered the contract as between the United States and the Senecas, and, apparently, also as between the United States and the Cayugas and Onondagas residing with the Senecas.

In the treaty of 1838 (art. 10) the Seneca Nation had solemnly agreed "to remove from the State of New York to their new homes within five years, and to continue to reside there," and the same article provided that the income from the proceeds of the sale of their New York lands should be paid to them "at their new homes." In the new agreement between the Senecas and Ogden and Fellows, incorporated into the treaty of 1842, however, the latter covenant and agree that the Seneca Nation (not a portion of it merely, but "they, *the said nation*"), notwithstanding the agreement of 1838, "shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation and the Allegany Reservation, with the same right and title in all things as they had and possessed

therein immediately before the date of the said indenture," i. e., the indenture of sale to Ogden and Fellows, incorporated into the treaty of 1838. The continuance of the Senecas "in the occupation and enjoyment" of the Allegany and Cattaraugus reservations (containing together 52,149 acres, and abundantly sufficient for the needs of the Senecas and those residing with them, if they lived as civilized communities) was manifestly incompatible with the fulfillment of their agreement to remove, made with the United States in the treaty of 1838. That agreement bound them *not* to continue to occupy or enjoy any reservations in New York whatever; it bound them *not* to do the very thing which the new indenture declared that they might and should do.

The execution of the new indenture was, therefore, a solemn declaration by the Seneca Nation that it would not fulfill its agreement to remove under the treaty of 1838, and when the United States by treaty consented to the several articles and stipulations contained in the new indenture, it declared its recognition of the fact that the Seneca Nation had abrogated its contract to remove contained in the tenth article of the treaty of 1838.

It is true that in *Fellows* v. *Blacksmith* (19 How., 366, 370), Nelson J., said *obiter*, that "their agreement to remove to their new home * * * remained unaffected by the second treaty," but in spite of this *dictum*, when the treaties are carefully compared, it is impossible to regard the indenture of 1842 as anything else than a formal and avowed abrogation by the Seneca Nation of its agreement to remove. For a valuable consideration

it reacquired its title to these two reservations, which title of itself involved the right to continue in the occupation and enjoyment of the whole of the reservations, even without an express covenant by Ogden and Fellows in regard to that right. The exercise of that right being the only possible object of the act of the nation in reacquiring the title, that act was a formal declaration that the Seneca Nation would exercise that right, and, therefore, as the agreement to remove was an agreement not to exercise that right of occupation and enjoyment, the act of the Seneca Nation was a formal abrogation of its agreement to remove. Had the title which the Senecas reacquired been in fee simple, so that the right of occupation and enjoyment would have been theirs whether they exercised it or not, even then the reacquisition of such a right would have been wholly inconsistent with an agreement not to occupy and enjoy. Their title, however, was not in fee simple (Rec. 22–23; and see *Strong* v. *Waterman*, 11 Paige (N. Y.), 607, 610), but depended for its very existence upon actual occupation and enjoyment, and hence *a fortiori* their act in reacquiring such a title was irreconcilable with the continuance of their agreement to remove.

Had the reservations reacquired by the Senecas been too small to contain the whole nation, it might have been possible to argue that the reacquisition did not have the effect above stated, but as 52,149 acres of fertile land would certainly support a population of 2,309 (or even 2,633, which would include the Onondagas and Cayugas), who did not live by hunting, like their forefathers, but

by farming, there is no room for such an argument. Again, had the land been held in severalty, the abrogation of the tribal contract might possibly have been held not complete, but proportionate to the population who would remain at Allegany and Cattaraugus; but as the land was tribal property, in which each member of the tribe had as good a right as another, there is nothing to break the force of the declaration that "the said nation" should continue in the occupation and enjoyment of the two reservations.

That both the Senecas and the United States understood the indenture of 1842 and the treaty affirming it as rescinding the Seneca contract in article 10 of the treaty of 1838 is clear from the second article of the new treaty, wherein the United States consented that any number of the Seneca Nation who should remove from New York under the provisions of the old treaty should be entitled to all its benefits in proportion to their numbers. No such provision was necessary in order to guard against the effect of a mere failure on the part of the Seneca tribe to keep its agreement to remove, an agreement necessarily involving the removal of the tribe, i. e., substantially all its members. The effect of a partial emigration was regulated by the proviso of the Senate resolution of June 11, 1838 (Rec., 17), that if any part of the Indians did not emigrate the quantity of land set apart for them and the money to be appropriated should be proportionately reduced. To have any meaning at all, the second article of the treaty of 1842 must have contemplated not a possible partial failure of compliance by

the Senecas with their agreement to emigrate, but an actual forfeiture by the tribe of all its interest in the lands set apart by the treaty of 1838.

The Senecas having in article 10 of that treaty accepted the country set apart for them and agreed to remove, they could not forfeit their interest in that country so long as their agreement remained in force. If, however, that agreement were rescinded, made as if it never had been, the forfeiture clause of article 3 of the treaty of 1838 would take effect *ipso facto*. While to most of the tribe this would have been a matter of indifference if not satisfaction, there were a few restless ones who wished to emigrate, and to provide for them the second article of the treaty of 1838 was adopted. Without a rescission and consequent forfeiture this article would have been not merely superfluous, but meaningless; understood with reference to a rescission and forfeiture, its meaning and utility become at once apparent.

By the operation of the indenture and treaty of 1842, the position of the Seneca Nation as to emigration under the treaty of 1838 was precisely that of the St. Regis tribe under its supplemental article. The nation as such did not agree to emigrate, nor had it any interest in the land originally set apart for it, nor any claim upon the United States for an appropriation for its removal and settlement, but such individuals of the nation as should actually emigrate under the provisions of the treaty of 1838 would be entitled to a share, in proportion to their numbers, both in the land and in the treaty. As to this point, the treaty of 1842 simply embodied the provision which the Senate, by its resolution of June 11, 1838

(*supra*), had attached, as an inseparable condition, to the treaty of 1838, viz, that the land should be given to actual emigrants only, and only in proportion to their numbers, allowing 320 acres for each emigrant, and that the money should be similarly applied. Had that provision not been substantially embodied in the new treaty, it might have been held to have been superseded thereby; but as it is there can be no such result.

The agreement of the Senecas to remove, contained in article 10 of the treaty of 1838, was made not merely on their own part, but also in behalf of the Cayugas and Onondagas residing with them. The article reads: "It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas residing among them," a certain tract, "to include one half section (320 acres) of land for each soul of the Senecas, Cayugas, and Onondagas residing among them . . . and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there." The agreement to remove, following as it does upon the agreement in regard to the particular tract set apart, which was unquestionably made in behalf of the Cayugas and Onondagas, must also be regarded as so made.

That it was so understood is shown by the fact that articles 11 and 12, which make special provision for the payment of money to the Cayugas and Onondagas "at their new homes," "on their removal West," contain no further agreement to remove, although such agreement was, by article 3, necessary to prevent a forfeiture of all interest in the lands set apart for them. As the carrying out of

the provisions of articles 11 and 12 was dependent on a removal, to which an agreement to remove was a necessary precedent, that agreement must have been regarded as made for the Cayugas and Onondagas by the Senecas, with whom they resided, the action of the latter being ratified by the two former tribes by their execution of the treaty. This being the case, and in view of the fact that by the treaty of 1838 the Cayugas and Onondagas were to continue to reside with the Senecas in the West just as they had done in New York, the rescission by the Senecas of their agreement to remove may properly be understood as rescinding the agreement of the two other tribes also, who, be it observed, had been a unit with the Senecas in their opposition to the treaty of 1838, both before and after its ratification. (Rec., 18.)

The second condition attached to the rights of the Indians in the country set apart by the treaty of 1838 was that of actual removal. This condition would have attached by necessary implication of law, even if the Senate had not imposed it in express terms. The covenants of the United States were promises in consideration of a promise, and the failure of the Indians to keep their promise was a failure of consideration, which, after that failure became manifest, relieved the United States from any further obligation in regard to its own covenants. In the case of the St. Regis tribe, and ultimately of the Senecas, and the Cayugas and Onondagas residing with them, there was, as has been already shown, no promise of removal, and hence no substantial consideration for the covenants of the United States, which covenants must be regarded as having given to these tribes a

mere option to share, in proportion to the numbers of their emigrants, in the privileges of the accepting tribes, which option was to expire with the time fixed for the emigration.

In point of fact, however, the Senate did not leave the respective rights of the United States and the Indians to any legal implication, but in its first resolution of ratification, June 11, 1838, provided as follows:

> *Provided further*, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of $400,000, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as shall leave to each emigrant 320 acres only. (Rec., 17.)

As has been stated above, this proviso is conclusive against any theory that the treaty, as amended, contemplated a forcible removal of the Indians, and it is certainly no less conclusive as to the right of the United States, by Executive action merely, and without any action by Congress, to dispose of the surplus land and money in case the emigration was but partial.*

*The court below being convinced, and properly so, that the action of the United States in disposing of the surplus land and money was justified by the failure of the Indians to emigrate, irrespective of any express power of disposition reserved by the Senate, has not, as far as appears from the opinion delivered, based its decision of the case upon the Senate's proviso, and has, in fact, misconceived its application. The opinion reads:

> The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty, with the Senate amendments, be submitted and explained to each of the tribes

Of the binding force of this proviso little need be said. Article 12 of the original (article 7 of the amended) treaty provided that the President and Senate must first pass upon the treaty before it should be binding. The Senate, in its resolution of June 11, 1838, declared the terms upon which it was willing that the United States should be bound. The Senate's resolution is as much a

> or bands separately and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it, and the President should thereupon make a proportionate reduction from the $400,000 fund and the quantity of land provided for west of the Mississippi. (Rec., p. 31.)

The error in this combination of two distinct provisos, intended as they were to meet two different contingencies, and the scope of their application being different, requires no lengthy demonstration. The opinion disregards the words "do not emigrate," and treats the second proviso as if it read "do not assent to the amended treaty." The provisos read as follows:

> *Provided always, and be it further resolved (two-thirds of the Senate present concurring)*, That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only. (Rec., 16-17.)

The first proviso affected the various bodies, the "tribes, nations or bands," which composed the aggregation known as New York

part of the treaty as the original document executed by the tribes. Both together constitute the ultimate treaty, the contract between the parties. As a part of that resolution, the proviso stands on the same ground with the proviso requiring the free assent of the tribes in council, and with the amendments. It is in fact, as a statement of what the United States agreed to, as much a part of the

Indians. It affected them in their corporate, treaty-making capacity, and established the conditions upon which alone the treaty should be binding upon each one of them, the binding force being dependent in the case of each tribe, nation, or band upon its own separate corporate action, irrespective of what the other tribes, nations, or bands might do. This proviso had no reference to the action of individuals, nor to the ultimate fulfillment of any portion of the treaty, but only to tribal action in declaring assent to the treaty, and its binding force in consequence.

The second proviso concerned the action of individuals and their performance or nonperformance of what the tribes had undertaken should be done, or (as in the case of the St. Regis tribe, and subsequently the Senecas and others) had stipulated might be done. It ordered that if "any portion or part of said Indians," i. e., any individuals out of the whole body of New York Indians, without regard to tribal aggregations, should not emigrate, then only the portion or part that did emigrate, only the individuals who undertook to do what their tribes had agreed that they should do or had stipulated that they might do, these only should receive, each for himself an individual's share in the land, and should also share, in proportion to their numbers, in the benefits of the expenditure of the money that was to be appropriated, the unexpended balance, both of land and money, to be retained by the United States. This proviso had nothing whatever to do with the binding force of the treaty upon the several tribes, nations, or bands, as did the first proviso. It merely arranged what should take place under the various circumstances that might arise in the future, whether the treaty was assented to, in accordance with the first proviso, by all of the tribes or not.

treaty as if it had been incorporated into the text by amendment, or even formed one of the original articles. The only difference between it and a provision of the original treaty is that as the proviso was in substance an amendment of the treaty, it had to be made known to the tribes and assented to by them before they would be bound by it. That it was so made known and assented to is clear. The resolution containing the proviso was ordered to be laid before the President, and in August and September the commissioner convened councils of the tribes. Each tribe declared separately its "free and voluntary assent to the foregoing treaty *as amended by the resolution of the Senate of the United States on the 11th day of June, 1838*, * * * the same having been submitted to us * * * and fully and fairly explained * * * to our said tribe in council assembled." By the same solemn declaration of assent to the treaty, upon which declaration each tribe that was really a party to the treaty bases its present claim, each assenting tribe declared that the whole effect of *the resolution of the Senate* in amending the treaty had been fully and fairly explained to such tribe, and that its assent was given on that basis.

But for the circumstance that the protests of the Senecas against the validity of the assent of their tribe to the treaty induced the President twice to send back the amended treaty to the Senate, that body would have taken no further action in the matter. Such action being, however, required, the Senate, both on March 2, 1839 (Rec., p. 17), and on March 25, 1840 (Rec., p. 18), adopted resolutions referring to its resolution of June 11,

1838, and thereby reaffiming it. On March 2, 1839, they resolved that the treaty should be proclaimed when the President was satisfied that the treaty had been assented to in accordance with the resolution of June 11, 1838, while on March 25, 1840, they resolved that it had been so assented to. On both these occasions the Senate upheld the resolution of June 11, 1838, and on neither did they revoke or rescind any portion of it. Finally the proclamation of the treaty, April 4, 1840 (Rec., 18), itself declared that the President's action was taken "in pursuance of the resolutions of the Senate of the 11th of June, 1838, and 25th day of March, 1840," thereby calling attention to those resolutions, the first as well as the second, as the warrant for his action. By the terms of the treaty itself its validity was to depend upon the action both of the Senate and of the President. The Senate, by its resolution, declared what should be the provisions of the treaty, and what the terms upon which it should be binding upon the parties. These provisions and terms were communicated by the Senate to the President, as his proclamation shows; but had this by any chance been otherwise, and had the President proclaimed the treaty with any other provisions or upon any other terms than those adopted by the Senate, or with the omission of any of these provisions or terms, then the treaty proclaimed would have been something else than that assented to by the Senate, and therefore invalid.

In *Doe* v. *Braden* (16 How., 635), where the King of Spain had, in his ratification of the treaty for the cession

of Florida, added a declaration that certain grants should be held to have been annulled, the Supreme Court said:

> It is too plain for argument that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or *adding a new and distinct stipulation*, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and *as binding and obligatory as if it were inserted in the body of the instrument*.

In the present case, the only difference was that the proviso being contained in the Senate's resolution of advice and consent was not corporeally annexed to the treaty, it not being the practice to annex such resolutions; but the resolution being made known to the tribes, the proviso became as much a part of the treaty as if it had been annexed to or incorporated in it. The assent of each of the tribes, therefore, operating as it did as a renewal of the former acceptance of the country and agreement to remove, was an acquiescence in all the limitations imposed by the Senate upon the rights acquired by the respective tribes in the country accepted.

The proviso itself was clear and explicit. The words "do not emigrate" are not, indeed, expressly limited either as to time or place, but being used of an emigration under the treaty of 1838 they can only refer to such an emigration as was provided for by that treaty, and such as all but one of the tribes who were parties to it had agreed to make (though some of them were subsequently

released from the agreement), viz, an emigration to the country set apart in the West, within five years from the proclamation of the treaty, subject to the right of the President to extend the time if he saw fit. A "proper proportion" of the $400,000 was evidently such a part as would give the emigrating Indians substantially the same benefits as they would have had if all had emigrated. The whole proviso was so drawn as to be capable of being carried out without difficulty by Executive action, and it was carried out.

3. The course pursued by both parties.

As to this point it is submitted—

EXCEPT IN SO FAR AS THE FAILURE OF THE INDIANS TO EMIGRATE HAS RELEASED THE UNITED STATES FROM THE OBLIGATIONS IMPOSED BY ITS COVENANTS CONTAINED IN THE BUFFALO CREEK TREATY OF 1838, THE SAID COVENANTS HAVE ALL BEEN FULLY PERFORMED—BOTH THOSE WHOSE PERFORMANCE WAS NOT DEPENDENT ON THE EMIGRATION OF THE INDIANS AND THOSE WHICH RELATED TO THEIR EMIGRATION AND PERMANENT SETTLEMENT.

The covenants which were independent of the emigration of the Indians were those for the payment of $5,000 to the St. Regis tribe and $6,000 to the First Christian and Orchard parties of the Oneidas in New York, and in regard to the money to be paid the Senecas by Ogden and Fellows. (Arts. 9, 10, 13.) Finding XVIII (Rec., 21) shows that these covenants have all been fulfilled; but the character of the present claim is well illustrated

by the fact that the petition included a demand for the $5,000 as due the St. Regis and the $6,000 as due the Oneidas, as well as $1,625 alleged to be due certain chiefs, although the vouchers showing payment in full were in the Treasury, the facts of such payment having been either concealed or forgotten by the Indians, and, in consequence, wholly unknown to their counsel.

The fulfillment of the covenants relating to emigration and settlement is shown by the findings and certain statutes to have been as follows: The tribes whose reservations had been sold to Ogden and Fellows (viz, the Senecas, the Cayugas and Onondagas residing with them, and the Tuscaroras) continued, after the treaty of Buffalo Creek had been ratified, to protest against its being carried into effect, requesting that no appropriation be made for that purpose, and declaring that they would never emigrate but on compulsion. The Senecas in particular asserted that their declaration of assent to the amended treaty was invalid. These protests continued until the Seneca treaty of May 20, 1842, was made, and on the part of the Tuscaroras even later, the chiefs of this tribe declaring that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. After the treaty of 1842 the Indians of the Buffalo Creek Reservation settled on the Cattaraugus and Allegany reservations. Some of the Indians did apply to the Government for the proper steps to be taken for their emigration. (Rec., 18, 19.) It does not appear at what time such application was made, but it was, most probably, not till after the treaty of 1842, as

until the making of that treaty the opposition to removal was intensely strong on the part of the Senecas, and the Cayugas and Onondagas residing with them, because all the Seneca reservations having been sold to Ogden and Fellows by the indenture of 1838, a complete emigration of these three tribes was required, and no merely partial emigration would have been possible. It was only by opposing *all* emigration that the nonemigrationists (whom the issue proves to have been greatly in the majority, in spite of the fact that chiefs had been found to execute the treaty) could hope to secure some measure of relief. After the treaty of 1842 had granted that relief, but not before, the emigration party was naturally left free to apply for the promised aid in removing.

It does not appear precisely how many Indians applied to have the proper steps taken for their emigration, but there could not have been many such, for "it was not deemed expedient to enter into any arrangements for this purpose until the Department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove" (Rec., 19), and the agent was not appointed till 1845. As the *Act of March 3, 1845* (5 Stats., 612), appropriating $20,477.50 to carry out the provisions of the treaty in regard to 250 Indians, made that sum available, "provided that so many are willing to emigrate," it may fairly be inferred that 250 constituted the "sufficient number to justify the expenditure incident to the appointment of an agent," and that such number did not manifest their intention to remove until 1845.

In point of fact, the ultimate emigration was of less than the "sufficient number," for though Hogeboom, the agent, mustered 271 Indians for emigration, only 198 started with him, and of these only 191 stayed with him till the end of the journey, while 17 other Indians arrived subsequently, making a total emigration of 208. Of this number 82 died, 94 returned to New York, and 32 remained on the land and received allotments in 1860. (Rec., 19, 21.)

The cost of the emigration was $6,834.79, viz, $1,034.50 for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling, and $5,800.29 for transportation, supplies on the journey, and the pay of the emigration agent. After the emigration party reached its destination, $2,962.32 were expended for supplies, etc., for them, including $350 for medical attendance and supplies. (Rec., 21.)

The President never appointed any other time for emigration than the five years fixed by the treaty, but the Hogeboom party was allowed to emigrate shortly after the five years had expired. In June, 1846, while that party was on its way, the Senecas, and the Cayugas and Onondagas residing with them, met in council at Cattaraugus. The Tuscaroras had been summoned, but did not attend. The chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained, and the commissioner for the United States held an enrollment, but could find only seven Indians with a report of five others, who wished to emigrate. (Rec., p. 19.) As already stated, 17 Indians emigrated after the

Hogeboom party went, presumably after this council was held. The findings disclose no subsequent request for permission to emigrate.

The findings do not indicate any neglect of the Government to fulfill its treaty obligations to those few Indians who availed themselves of the provisions of the treaty and actually emigrated. The failure of the emigration may be sufficiently accounted for without assuming that the Government was in default. The settlement of a new and uninhabited region by those who come from a distance involves, under the most favorable circumstances, many privations, much suffering, and usually not a few deaths. Resolute energy and great adaptability to circumstances are indispensable to successful colonization; but they are qualities in which Indians are conspicuously lacking, while these particular emigrants were presumably the least competent members of their tribes—the rolling stones, who had failed to win a livelihood on the fertile reservations in New York. That many of them sickened and died and many others lost heart and returned is not at all to be wondered at, while the fact that 32 remained on the land for years afterwards shows what all might have done had they possessed the same capacity and physical powers of endurance.

The emigrants who returned necessarily lost, by such return, whatever rights they might have had by virtue of their emigration. The rights of the 32 who remained on the land and received their allotments in 1860 were adequately provided for by the act of February 19, 1873 (17 Stats., 466), and in point of fact the petition in this

case makes claim for the value of 1,605,760 acres specifically (Rec., p. 5), which quantity is reached by deducting from the 1,824,000 acres mentioned in the treaty the 10,240 acres allotted to the 32 permanent emigrants, as well as the 208,000 for which compensation was made to the Tonawandas in 1857. As to the share of the 32 permanent emigrants in the $400,000, the United States having paid for their transportation and supplies on the way, and for supplies to them during the first year of their stay, and they having been able to remain on the land for at least fourteen years after they came there, the United States must be presumed to have done for them all that was necessary, and at all events the record discloses nothing to the contrary.

Moreover, the treaty can not properly be understood as imposing upon the United States any obligations whatever to any such insignificant portion of the Indians with whom the treaty was made as these 32 individuals. The treaty was made with whole tribes, and the covenants of the United States were made to those tribes, and not to individuals, and they were made in contemplation of an emigration of whole tribes, or at all events of a substantial portion of the population of those tribes. The tribes and bands who appear of record as having assented to the amended treaty (viz, the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis) numbered in 1837 3,826 persons, and an emigration of 32, or even of 208 (the number that actually reached the land), can not be regarded as such a compliance with the original agreement to emigrate as to impose any obligation upon the

United States under its covenants. That it did voluntarily aid these people "in removing to their homes, and supporting themselves the first year after their arrival," and that it gave 320 acres apiece to the 32 who remained, is no reason for unduly extending the obligations of its covenants. The promise to appropriate money "to encourage and assist them in education, and in being taught to cultivate their lands, in erecting mills and other necessary houses, in purchasing domestic animals and farming utensils, and acquiring a knowledge of the mechanic arts" necessarily contemplated a community of substantial size as the recipient of such aid, and not a mere handful of 32 individuals. All claim on account of the Indians who emigrated may therefore be set aside, and the case of those who remained in New York need alone be considered.

4. The rights of both parties in consequence of the course pursued.

The conclusions reached by the court below in this matter are contained in the following paragraphs:

> It can not be doubted that if the plaintiffs in this action really wished to avail themselves of the treaty grants the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. But the Government was not prepared to resort to harsh measures, or, against his will, to drive the Indian from his home, so it made a bargain with him in 1838, and that bargain it fulfilled in moving the Hogeboom party, for in doing this it moved all the

> Indians who then or since (so far as is shown) have ever wished to leave New York for the Kansas lands.
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> We have no reason to doubt that the United States took to Kansas all the Indians who wished to go there, and thus substantially fulfilled their share of the contract. Some Indians went to Wisconsin, as they had a right to do, and there received land as was promised. The mass of the Indians remained in New York, as they preferred to do and as they had a right to do, and sold their lands or now remain upon them.
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> * * * * *
>
> Upon the whole case it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek, but as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfillment and preferred the then existing situation—no damage to either side can be said to have been inflicted. (Rec., pp. 41, 42.)

These conclusions are amply warranted by the findings, especially when it is remembered that the Senate resolution of June 11, 1838 (one of the two resolutions upon which the treaty depended for its validity), had expressly provided that only actual emigrants should receive either land or financial aid, and that the United States should keep whatever balance of either might be left.

(Rec., p. 17.) The findings do not indicate that any substantial number of the Indians ever applied to be removed, but they do show most clearly, as does also the treaty of 1842, that the great majority of the Indians never had wished to emigrate.

The findings state that "many of the Indians have protested against any removal," that only 271 were mustered for emigration with Hogeboom, of whom only 198 started with him, and that the commissioner who attended the council held just after Hogeboom's start, and who held an enrollment for two full days, could only learn of 12 others who wished to go, who presumably were among the 17 who afterwards joined Hogeboom's party. The only conclusion that can possibly be drawn from such a state of facts is that the Indians themselves are responsible for their failure to emigrate and for the consequences of that failure.

In opposition to this conclusion it was contended in the court below:

First. That it was the duty of the United States to remove the Indians, which it has neglected to do.

Second. That it was the President's duty to fix a time for the removal of the Indians, which he has neglected to do.

Third. That the Senate proviso, directing what should be done in case any part of the Indians did emigrate, was void.

Fourth. That the Tonawanda treaty of 1857 recognized a right in the Tonawanda Senecas to the land in Kansas, and a right to be removed there, even at that date,

and that all the parties to the treaty of 1838 have the same rights.

Fifth. That the alleged right of the New York Indians to the possession of the land set apart by the treaty of Buffalo Creek of 1838 was recognized in certain acts of Congress passed in 1854, 1859, and 1861 as a right existing at the respective dates of the said acts.

As to the first contention, it has been already made sufficiently clear in the first part of this brief that after the execution of the treaty of 1842 the United States had no right to remove any of the Indians to the West against their will; but even if this right could possibly be held to have existed, its existence would not have involved a duty to compel the Indians to go. As the court below has said, "Perhaps the President had the power and technical right, * * * but it was not a power he must use, and it was not a power which the Indians wished him to use." (Rec., p. 41.) The only question, then, is whether the United States has performed its duty of removing to the West those Indians who wished to go.

It was urged in the court below, as an evidence of the failure to perform this duty, that but a little more than a twentieth part of the promised $400,000 had ever been appropriated, but this argument overlooks the fact that the $400,000 was to be applied to many other items besides removal, and also that there was no agreement to appropriate the $400,000 all at once, but merely to appropriate that amount in the aggregate, or a less amount, according as the emigration should be complete or not. Had every Indian whose tribe is named in Schedule A

been removed, the expense would probably not have exceeded $150,000. The 208 who went to the West represented a cost to the Government before and during their journey, of $6,834.79, including the agent's pay. This comes to less than $33 apiece; and had the number been greater the proportionate expense would probably have been less. As far as the cost of transportation and supplies on the way were concerned, an appropriation of $20,477.50 would have sufficed for at least 600 people. After March 3, 1843, therefore, the Government may be held to have stood ready to remove at least 600 people, and had more than that number applied a further appropriation would certainly have been forthcoming. As the findings show that the Indians who went West were not all who were given an opportunity of going, but that they were practically all who wished to go, it is idle to talk of a failure on the part of the United States to provide sufficient money for the removal of others, who are proved to have had no desire to go.

As to the second contention, it has also been made sufficiently clear already that the treaty fixed a limit of five years, counting from the day of its proclamation, of course, for the time within which the emigration should take place, giving to the President, however, the right, in his discretion, to extend the time, but not requiring him to do so. He did not make any specific extension of the time, but, as was certainly within his power, he allowed the Hogeboom party to remove in 1846, more than a year after the expiration of the five years. Had any other party wished to remove within a reasonable time thereafter it would presumably have had an extension of the

time made in its favor, but as it had become evident by June, 1846, that no further emigration would take place, the President was not called upon to take any further action in the matter.

Granting, for the sake of the argument, that the intention of the treaty was to require the President to appoint a time for removal, was he required to do so in 1859, before the United States could resume control of the lands? Clearly not. The only object in appointing a time was to notify those Indians who wished to emigrate, so that they could do so in time. The Indians (except the small party who went with Hogeboom), both by word and deed within the five years originally named, as well as shortly after the expiration of that period and the departure of the Hogeboom party, and by their consistent course of action in the fourteen years subsequent thereto, had announced their fixed determination not to occupy the lands. Their open declarations against emigration may fairly be taken as a waiver of the right (if such existed) to have the original five years extended, and at all events their whole course up to 1859 made it clear that if the President had in 1859 appointed a final time for their removal it would have been an empty form. The case comes therefore within the rule that when it is reasonably certain that an act necessary to the establishment of a right will be nugatory on account of the determination of the other party not to regard it, its performance will be considered as waived. (*Hills* v. *Exchange Bank*, 105 U. S., 319; *United States* v. *Lee*, 106, *id.*, 196, 202.)

The third contention, as to the Senate proviso, is one which it is hard to treat seriously. The force of the

proviso, as a declaration of the terms upon which the United States consented to be bound by the treaty, has been considered above. The appellants can not contend that this proviso was not a part of the Senate's resolution, nor that it was not communicated to the tribes, nor that the Senate ever revoked it, nor that the President's proclamation, reciting that he acted by authority of that resolution, did not give notice to all the world of the existence of that resolution, and of the proviso as a part thereof. The only flaw that they can find in it is that the editor of the seventh volume of the Statutes at Large neglected to publish the proviso along with the treaty; but as this volume was not published till 1853, fifteen years after the Indians had been informed of the proviso, and seven years after they had finally decided not to emigrate, this neglect could not have harmed them seriously.

Granting, however, for the sake of the argument, that the proviso should, for some reason not now apparent, be disregarded, the right of the United States to retain the unoccupied land and the unexpended money would still be unassailable. The United States had promised the Indians to set apart certain land, to expend $400,000 in connection with their removal to and permanent settlement upon the said land, and ultimately to grant them the land itself, in consideration of the promise of the Indians to remove to the said land. The United States removed to that land in 1846 all of the Indians who wished to go there, and paid the cost of such removal and of the maintenance of these Indians upon the land for a certain length of time. All

the other Indians declared either in express terms or by an equally significant course of inaction that they had no intention of fulfilling their promise. Some of them never had promised to remove, but had merely obtained a right to do so within a limited time. Under the circumstances, the consideration for the promises of the United States having failed, and the performance of those promises having ceased to be desired by the promisees, the United States was relieved of all further obligation in regard to either the land or the money, except as to those Indians who had removed to the land promised and had remained thereon, and hence the United States had a right to dispose of the unoccupied land and the unexpended balance of the money as it might see fit.

As to the fourth contention, the peculiar position of the Tonawanda band has been already referred to in discussing the case of *Fellows* v. *Blacksmith* (19 How., 366). They were a band of the Senecas, living on a reservation which had been sold with the Government's approval, but which they had refused to surrender. The courts having no jurisdiction over the contract of sale, it was the Government's duty to see that it was carried out. This duty had been neglected, apparently out of consideration for the Indians, and in 1857 the latter were still on the land. Whether all the spare land on the Cattaraugus and Allegany reservations, to which the Tonawandas might have retired in 1842, was occupied or not does not appear, but as Kansas was rapidly filling up, and was, moreover, in a very disturbed condition between the free-soil and slavery parties, emigration thither offered

no advantages, and as it was evident that the Indians were greatly attached to their old homes.

Had the United States simply required the Ogden Land Company to abandon its rights under the contract with the Indians, it would have been guilty of a breach of faith to the company, while unless it was prepared to do so the Indians had to be taken care of in some way. Accordingly the United States, with extreme generosity, gave the Indians money enough to buy from the Ogden Land Company the fee-simple title to nearly two-thirds of the reservation (all that the Indians wished to retain), and also to provide an increased tribal annuity. (Rec., p. 21.) In this way both the Indians and the Ogden Company were satisfied. That the sum fixed on, $256,000, represented the value of the land originally set apart for these Indians under the treaty of Buffalo Creek, and their proportionate share of the fund of $400,000, originally provided, and that it was given them in consideration of a release of all claims that they might have had under that treaty, were mere matters of detail. The main point was that the United States felt itself bound in honor to do something for these Indians, and it is immaterial how it chose to estimate the money value of the obligation. No other Indians were in the same position as the Tonawandas, and what the United States did for them was no recognition of any obligation to Indians differently situated. In fact, as is stated in the opinion of the court below, that the Government paid the Tonawandas, but not the other Indians, is in itself a recognition that the latter did *not* stand on the same ground as the Tonawandas. (Rec., pp. 37–8, 39.)

The fifth contention has as little foundation as the others. The "*Kansas-Nebraska*" *Act of May 30, 1854*, section 19 (10 Stats., 284), reads as follows:

> *Provided further*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Kansas, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

This proviso first guarantees the rights of person or property of all the Indians then (in 1854) in the Territory of Kansas. This guaranty affected but about 32 New York Indians, as there were only that number then in the Territory, and as allotments were subsequently made to them it can hardly be claimed that the guaranty has been violated.

Next, this proviso excluded from the limits of the Territory lands which, under Indian treaties, were not to be included in any State or Territory until the tribes affected assented to being included. The treaty of Buffalo Creek

provided that "the lands secured to them *by patent* under this treaty"—the lands, that is to say, that should thereafter be taken up by the Indians and which should be granted to them by patent—should never be included in any State or Territory. This restriction of the privilege of noninclusion to the lands actually settled and patented is entirely in accord with article 3, which restricted all interest in the lands to those tribes that accepted them and agreed to remove thereto, and with the all-controlling proviso in the resolution of June 11, 1838, which required, in case the emigration were not completed, the deduction of all but 320 acres for each actual emigrant.

In 1854 no patents had issued to any of the New York Indians for the land they had settled on in the West, and hence, strictly speaking, the privilege of noninclusion did not extend to any of their land, so that the act of Congress did not apply to it at all. Possibly the right of the 32 to receive patents for their lands may be held to bring them within the operation of the act of Congress, but certainly they are the only individuals whose rights it can by any possibility be held to recognize.

Lastly, the proviso affects the authority of the United States over the Indians and their lands, but as far as concerns the New York Indians, this, like the other parts of the proviso, can at most refer to the 32 settled Indians only. It is clear that no part of the proviso recognizes any rights as existing in any of the Indians in New York, and it is to be observed that the proviso could not have been inserted for their benefit, as it is a general provision

applying to all the numerous Indian tribes in the proposed Territory, as well as in that of Nebraska, the identical language being found in section 1, which applies to Nebraska, both Nebraska and Kansas having been carved out of the Indian Territory.

The *Act of March 3, 1859*, section 11 (11 Stats., 431), is most naturally understood as referring to the New York Indians then *in Kansas*, and as providing that patents, with guards and restrictions to be prescribed by the Secretary of the Interior, should not be issued to them, presumably because the character of the patents to which they were entitled was fixed by the treaty, so that no further guards and restrictions were needed. Even if, by a strained construction, this proviso be held to refer to the New York Indians *in New York*, it could at most only manifest an unfortunate ignorance on the part of Congress, and does not go far enough to give to those Indians rights which they had ceased to possess.

The *Act of January 29, 1861*, section 1 (12 Stats., 137), recognizing the rights of Indians to lands in Kansas, and excepting such lands from the limits of the State, has no possible bearing on the case. It makes no reference to the New York Indians, while the lands once held for them, but of which they had lost their rights after 1845, had been made public lands by the President's proclamations of December 3 and 17, 1860.

The concluding words in the opinion of the court below, viz, that "the claimants herein have been treated with kindness and consideration, and have in no way been injured in their rights and privileges," involve no mere

figure of speech. The course pursued by the United States is precisely that which the Indians, one and all, requested it to pursue. It approved the reacquisition by the Senecas of the Cattaraugus and Allegany reservations, thereby releasing them from their agreement to remove; it aided the emigration of those who wished to emigrate, and it left in peace those who wished to stay. It performed to the full the measure of its duty, as stated by this court in *United States* v. *Kagama* (118 U. S., 375, 383), and *Choctaw Nation* v. *United States* (119 *id.*, 1, 27–28). Having so done, the United States was entitled to dispose of the surplus land and money, neither of which had ever been the subject of a grant to the Indians, but only of the promise of grants in the future provided the Indians qualified themselves to receive them.

The appellants have seen fit, on pages 32–36 of their brief, to discuss the respective rights of the different claimants in the event of a reversal of the judgment against them. It is submitted that such a discussion is wholly premature, but should the court for any reason desire to go into it, then it is submitted that some of the claimants have no rights whatever under the treaty of Buffalo Creek, because they never accepted the country set apart for them, nor agreed to remove thereto, as required by article 3. These were the Onondagas at Onondaga, the St. Regis, the Oneidas at Green Bay, the Stockbridges, Munsees, and Brothertowns. With the exception of the St. Regis these tribes were not even parties to the treaty of Buffalo Creek, for though the Green Bay Oneidas signed the original treaty, they did

not assent to it as amended. On the strength of the Senate resolution of March 25, 1840, "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians * * * have been satisfactorily acceded to and approved by said tribes," the court below has found that *all* the tribes named in the body of the treaty as possible beneficiaries were actual parties, but the most that that resolution can possibly mean is that *those tribes with whom the treaty was originally made* had satisfactorily acceded to it as amended. The treaty never having been made with the Onondagas at Onondaga, the Stockbridges, Munsees, and Brothertowns, the resolution manifestly did not apply to them, and in point of fact it should not be understood as meaning more than that all the assents were satisfactory. So understood, it also excludes the Oneidas at Green Bay, who never were called upon to assent to the amended treaty, because another treaty was made with them.

Of the tribes who did accept the country and agree to remove, the Tuscaroras can have no rights, because they subsequently declared officially, by their chiefs (Rec., p. 18), that they would not remove, thereby releasing the United States from all obligation to see to their removal.

The effect of the treaty of 1842, as rescinding the agreement to remove on the part of the Senecas, and the Cayugas and Onondagas residing with them, has been already considered. As all that was left to the Indians of these tribes was an *individual* right on the part of such as chose to emigrate to participate in the benefits of the treaty in proportion to their numbers, it is hard to see

what rights the tribes could have collectively to recovery for a violation of individual rights. Certainly the tribes could not recover without some proof that a reasonably definite number of Indians wished to emigrate and were prevented by the inaction of the United States, and the recovery could only be proportionate to that number, because the reacquisition of the Cattaraugus and Allegany reservations is proof positive that a large portion of these tribes would not have emigrated, whatever the United States had done.

As for the New York Oneidas, the findings show that most of them voluntarily went to Wisconsin, evidently because they preferred to be with their brethren there rather than go off by themselves to the Indian Territory. In no event could there be any recovery for interests which they thus voluntarily abandoned.

Hence, even if it were possible for the court to hold that the United States had failed to perform any of its treaty covenants, the evidence would still show that such failure could not have affected all the claimants, but only some small, unascertained number of individuals in a few tribes.

It is therefore submitted that the judgment should be affirmed.

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